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IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF SCHOLARS OF MORMON HISTORY & LAW AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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BRIEF OF SCHOLARS OF MORMON HISTORY AND LAW AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

The undersigned scholars respectfully submit this amici curiae brief in support of neither party.[1]

INTERESTS OF AMICI CURIAE

Amici curiae are twenty-one scholars of American religious history and law, with special expertise and familiarity with the history of The Church of Jesus Christ of Latter-day Saints (also known as the "Latter-day Saints," "Mormons," or "Mormon Church"). The amici are:

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[1] No counsel for any party authored this brief in whole or in part, and no person other than amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. A letter from counsel for the petitioners consenting to amici briefs is on file with the Clerk's office; letters of consent from counsel for respondents are being filed along with this brief.

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Although some amici are themselves Mormon, amici do not speak for the Mormon Church itself or for other members of the faith.[2] Rather, amici write because they have specialized knowledge of the fed-

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[2] Similarly, institutional affiliations of amici are provided for identification purposes only. Amici speak only for themselves in their personal capacity.

eral government's efforts to restrict Mormon immigration as part of the government's sustained 19th-century legal campaign against the Mormon faith. As this brief explains, this history illustrates the particular dangers of discriminating against religious groups in the immigration context, and labeling their members as "outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2012, the Mormon faith of the Republican candidate for president, Mitt Romney, was hardly a campaign issue.[3] But the idea of a Mormon president would have been inconceivable a century earlier. In the late 19th century, the government undertook a sustained legal campaign against members of the Mormon faith—a campaign that included attempts to limit Mormon immigration—which led to decades of Mormon exclusion from the American civic community.

The parallels between the Mormon experience and this case are surprising. Using language one might hear today about unpopular immigrant groups, 19th-century officials described Mormons as a "community of traitors, murderers, fanatics, and whores."[4] Politicians and the press explicitly compared Mormons to Muslims and "Orientals," viewing them as "distinct, peculiar, suspicious, and potential-

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[3] *Little Voter Discomfort with Romney's Mormon Religion*, PEW RESEARCH CENTER (July 26, 2012), http://www.pewforum.org/2012/07/26/2012-romney-mormonism-obamas-religion/ ("The vast majority of those who are aware of Romney's faith say it doesn't concern them.").

[4] DEAN L. MAY, UTAH, A PEOPLE'S HISTORY 115 (1987) (quoting Colonel Patrick E. Connor); *see also* W. Paul Reeve, *My View: Trump's Muslim Ban Looks Like Mormon Ban*, DESERET NEWS (Jan. 28, 2017), http://www.deseretnews.com/article/865672083/My-view-Trumps-Muslim-ban-looks-like-Mormon-ban.html.

ly dangerous outsiders."[5] Much of this fear focused on immigration: as Harper's Magazine wrote in 1881, the Mormon Church "is an institution so absolutely un-American in all its requirements that it would die of its own infamies within twenty years, except for the yearly infusion of fresh serf blood from abroad."[6]

The government responded to this popular animus by initiating a variety of legal measures targeting Mormons, including executive actions designed to cut down Mormon immigration to the United States. While immigration law was still in its infancy, executive branch officials urged Congress to ban Mormon immigration, issued official directives to all consular officials directing them to pressure foreign governments to limit Mormon immigration, and turned away Mormon immigrants at ports of entry.[7]

Amici are scholars of Mormon history and law, and do not take a position on whether the President's March 6, 2017 Executive Order[8] violates the Establishment Clause or is otherwise unlawful. But amici do seek to provide this Court with an example

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[5] W. PAUL REEVE, RELIGION OF A DIFFERENT COLOR: RACE AND THE MORMON STRUGGLE FOR WHITENESS 14 (2015); *see infra* Section I.B.

[6] William Mulder, *Immigration and the "Mormon Question": An International Episode*, 9 W. POL. SCI. Q. 416, 417 (1956) (quoting C. C. Goodwin, *The Mormon Situation*, HARPER'S MAGAZINE, LXIII, 763 (Oct. 1881)).

[7] *Id.* at 422-428; *see infra* Section I.C.

[8] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

of religious discrimination in immigration from America's past, and to show the harms caused by treating particular religious minorities as dangerous and foreign. If the Executive Order does target Muslims for disfavored treatment, then the history of the government's mistreatment of Mormons suggests it could take decades—if not longer—to undo the damage that official action would cause to both America's body politic and the place of Muslims in our society.

In recent years, this Court has taken steps to undo some of the harms inflicted by the government against Mormons, overruling the 1890 Supreme Court decision allowing Mormons to be deprived of the right to vote. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (recognizing that *Davis v. Beason*, 133 U.S. 333 (1890), is no longer good law insofar as it "held that persons advocating a certain practice may be denied the right to vote," and its legality is "most doubtful" to the extent it held groups may be denied the right to vote because of their status).

This case presents an opportunity to give the Executive Order the sort of genuine scrutiny that did not exist in the 19th century. This Court should ensure that history does not repeat itself by taking a hard look at the government's purported justifications for the Executive Order to determine whether the evidence supports "an affirmative showing of bad faith," *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring), because "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

ARGUMENT

I. The History of Religious Discrimination Against Mormon Immigrants Demonstrates the Need for Vigilant Judicial Review of Government Actions Based on Fear of Religious Minorities

Throughout the 19th century, many Americans viewed Mormons as dangerous outsiders because of their religious faith. Mormons suffered mob violence countenanced by state officials, legal attacks by the federal government, and a crusade of discrimination waged against Mormon immigrants because of their religion. This history demonstrates the ease with which exaggerated fears of religious minorities regarded as different can be translated into unconstitutional government policies.

A. Mormons Were the Objects of Widespread Religious Hostility in the 19th Century

The Mormon Church—officially the Church of Jesus Christ of Latter-day Saints—was founded in 1830. One of its earliest settlements was in Missouri, but in 1833 and 1838 mobs drove the Mormon settlers from their homes. The governor of Missouri then issued an executive order declaring "'[t]he Mormons must be treated as enemies, and must be exterminated or driven from the State,'"[9] and an

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[9] Gov. Lilburn W. Boggs, Executive Order (Oct. 27, 1838), *available at* https://www.sos.mo.gov/cmsimages/archives/resources/findingaids/miscMormRecs/eo/18381027_ExtermOrder.pdf. This order remained on the books in Missouri until it was rescinded in 1976. *See* Gov. Christopher S. Bond,

open letter urged all citizens to provide "assistance in expelling the fanatics [Mormons], who are mostly aliens by birth, and aliens in principle from the country."[10]

Many Mormons relocated to Illinois, but in 1844 an Illinois mob murdered Church founder Joseph Smith, and the Mormons were eventually driven out of Illinois as well. In 1847, the Mormons fled to the area of the Great Basin that would eventually become the state of Utah.

Public hostility grew even stronger in 1852, when the Mormon Church publicly announced the practice of polygamy as part of its religion. While only a minority of 19th-century Mormons practiced polygamy, the teaching deeply offended many outside the Church, and set off years of additional political conflict. After several decades of legal wrangling, the Mormon Church publicly abandoned polygamy in 1890. But not only had opposition to Mormonism predated the Church's embrace of polygamy, animus against the Mormons continued long after the Church abandoned the practice of polygamy.

One flash-point for public hostility was the Mormons Church's extensive and successful overseas proselytizing program. Throughout the 19th centu-

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Executive Order (June 25, 1976), *available at* https://www.sos.mo.gov/cmsimages/archives/resources/findingaids/miscMormRecs/eo/19760625_RescisOrder.pdf.

[10] DOCUMENTS CONTAINING THE CORRESPONDENCE, ORDERS, & C. IN RELATION TO THE DISTURBANCES WITH THE MORMONS; AND THE EVIDENCE GIVEN BEFORE THE HON. AUSTIN A. KING 40 (1841).

ry, Mormons pursued a successful missionary effort in Europe, especially Scandinavia and the British Isles, resulting in thousands of Latter-day Saint converts. Because of this program Mormon immigrants from around the world flocked to the United States, where the Mormon faith described a promised land.

The infusion of immigrants into the Mormon population heightened the brewing distrust and animosity of many other Americans. One widely-read celebrity pastor insisted that "'[u]nless we destroy Mormonism, Mormonism will destroy us'" and called, if necessary, for the use of "'howitzer and bombshell and bullets and cannon-ball'" against the Latter-day Saints.[11] Another pastor and public lecturer compared Latter-day Saint immigrants to European excrement and vermin, describing how Mormon immigrants came "from the dark lanes, and crowded factories, and filthy collieries of the old world,—sewerage and drainings of European population" to gather in a "great western hive" in Utah.[12]

This popular animus against Mormons was increasingly translated into law as the 19th century progressed. Congress criminalized bigamy in the territories in 1862, of course, but legal action against

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[11] REEVE, *supra* note 5, at 216 (discussing the pastor's background and his widely-published speeches on Chinese immigrants and Mormons).

[12] BENJAMIN MORGAN PALMER, MORMONISM: A LECTURE DELIVERED BEFORE THE MERCANTILE LIBRARY ASSOCIATION OF CHARLESTON, S.C. 32 (1853).

the Mormons included far more than simply the suppression of plural marriage:

- Congress dissolved the Mormon Church as a legal entity and confiscated its assets with the Edmunds-Tucker Act, Pub. L. No. 49-397, ch. 397, § 17, 24 Stat. 635, 638 (1887) (disincorporating the Church and creating procedures for the confiscation of its property);
- Mormons were systematically excluded from service on juries in the Edmunds Act of 1882, Pub. L. No. 47-47, ch. 47, § 5, 22 Stat. 30, 31 (1882) (excluding jurors who merely believed in polygamy);
- Congress revoked Mormon women's territorial right to vote, commanding that "it shall not be lawful for any female to vote at any election hereafter held in the Territory of Utah for any public purpose whatever, and no such vote shall be received or counted or given effect," with the Edmunds-Tucker Act, Pub. L. No. 49-397, ch. 397, § 20, 24 Stat. 635, 639 (1887);
- Mormon children of newly contracted polygamous marriages were disinherited, *id.* at § 11 (repealing territorial laws allowing "illegitimate" children to inherit);
- and Idaho deprived all Mormons of the right to vote, a deprivation upheld by this Court in *Davis*, 133 U.S. at 347, abrogated as explained by *Romer*, 517 U.S. at 634.

Notably, many of these actions did not explicitly or facially target Mormons, although the purposes behind the laws were clear. When Congress revoked women's right to vote in Utah, for instance, it made the law apply to all Utah women regardless of religion—but the fact Congress did not similarly disenfranchise women in neighboring Wyoming made its purpose plain, as did the context of the Edmunds-Tucker Act. 24 Stat. at 639.

B. Animus Against Mormons Was Often Linked to Animus Against Muslims or Other "Foreigners"

Public discussions of Mormonism became increasingly race-based as the 19th century progressed. While today it might seem odd that a group of mostly white Caucasians who practice a religion founded in America would be viewed as alien and foreign, 19th-century racial theorists suggested that the practice of Mormonism had given rise to a "physiologically distinct race."[13]

Indeed, politicians and the press often lumped Mormonism together with foreign and exotic non-

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[13] Nathan B. Oman, *Natural Law and the Rhetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism*, 88 WASH. U. L. REV. 661, 681 (2011); *see also* REEVE, *supra* note 5, at 14-15 (chronicling the idea of a "New Race" supposedly created by Mormonism); J. SPENCER FLUHMAN, "A PECULIAR PEOPLE": ANTI-MORMONISM AND THE MAKING OF RELIGION IN NINETEENTH-CENTURY AMERICA 111-117 (2012) (noting that "in the church's first decades anti-Mormon antagonists routinely invoked racial epithets as knee-jerk insults" and discussing 19th-century racial ideologies that were used to present Mormons as dangerous aliens).

Christian belief systems to emphasize its otherness. Thus, on the Pacific coast, concerns about Mormon immigration from Europe were coupled with concerns about immigration from Asia, both decried as examples of dangerous "oriental" outsiders.[14] Mormons were also frequently compared to the Hindus of India, and labeled a barbaric people in need of oversight just like the British Raj oversaw India—a type of oversight that would be unacceptable for "real" Americans.[15]

Most relevant here, Mormons were attacked through comparisons to Muslims, especially the perceived violent and lustful Turks and Arabs. The Church's founder, Joseph Smith, was derided as an "'American Mohamet.'"[16] In popular books, Mormonism was identified with "'the deepest debauchery, superstition and despotism known to Paganism, Mohammedanism or Medieval Papacy.'"[17]

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[14] *See also* REEVE, *supra* note 5, at 215-220. In 1882, the same Congress that passed the anti-Mormon Edmunds Act also passed the Chinese Exclusion Act. *See* Chinese Exclusion Act of 1882, Pub. L. No. 47-126, ch. 126, § 1, 22 Stat. 58, 58-59 (1882); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 657-661 (2005).

[15] Oman, *supra* note 13, at 684-685. As Oman explains, this "creation of a Mormon race had legal implications. Their status as a degenerate people justified imperial control, hence the common equation of federal rule in Utah with the British Empire in India." *Id.* (footnote omitted).

[16] *See* REEVE, *supra* note 5, at 221.

[17] PATRICK Q. MASON, THE MORMON MENACE: VIOLENCE AND ANTI-MORMONISM IN THE POSTBELLUM SOUTH 103 (2011).

This 1889 political cartoon illustrates how attacks on Mormonism employed comparisons between



Mormonism and Islam to paint Mormons in a negative light. The cartoon shows the anti-Mormon Senator George F. Edmunds of Vermont as a crusading Christian knight striking a prostrate man dressed as a Turk and identified on his headdress (enlarged in the inset) as a "Mormon bluebeard." And not only were Mormons likened to Muslims, but critics of Mormonism complained about the Latter-day Saints' "dangerously" sympathetic attitude toward Muslims.[18]

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[18] *See* FLUHMAN, *supra* note 13, at 109. Mormons do, indeed, have a long tradition of sympathy toward Muslims. In 1841, the Mormon city of Nauvoo enacted an ordinance promising "free toleration, and equal privileges in this city" to all oth-

C. Nineteenth-Century Immigration Restrictions Targeted Mormons Because of Religious Animus

The Executive Branch had a long history of attempting to limit Mormon immigration. As President Buchanan told Great Britain's Secretary of Foreign Affairs, "I would thank you to keep your Mormons at home."[19] Other presidents followed suit—even President Cleveland, one of the least antagonistic towards Mormons in that era, called on Congress to pass a law "to prevent the importation of Mormons into the country."[20]

These efforts to cut off Mormon immigration came at a transitional moment in the history of U.S. immigration law. For most of the 19th century, federal law placed no restrictions on migration. It was only in 1875, with the passage of the Page Act, that the federal government sought to substantially limit immigration. *See* Page Act of 1875, Sess. II, ch. 141, 18 Stat. 477 (1875); *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972).[21] Congress did not, however, at-

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er religions. As one scholar has observed, "[t]he only non-Christian religion specifically mentioned in the code was 'Mohammedans [Muslims],' which was a striking inclusion." REEVE, *supra* note 5, at 221.

[19] Mulder, *supra* note 6, at 422 (quoting John Bassett Moore, ed., THE WORKS OF JAMES BUCHANAN (Philadelphia, 1910), X, 318.)

[20] *Id.* (quoting James D. Richardson, ed., MESSAGES AND PAPERS OF THE PRESIDENTS (New York: Bureau of National Literature, 1897), XI, 4947).

[21] *But see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV.

tempt to impose religion-based immigration restrictions in the Page Act.

Lacking congressional action that could be the basis for excluding Mormons, in 1879 Secretary of State William Everts sent a letter to all American diplomatic officers, directing them to pressure European governments to stop Mormon emigration from their countries.[22]

The Secretary of State's official directive called on European governments to make sure the United States did not become "a resort or refuge for . . . crowds of misguided men and women," warning that "the bands and organizations [of Mormons] which are got together in foreign lands as recruits cannot be regarded as otherwise than a deliberate and systematic attempt to bring persons to the United States with the intent of violating their laws and committing crimes expressly punishable under the statute as penitentiary offenses."[23] The letter denounced Mormon converts as coming from among the "ignorant classes," and implored foreign governments "to check the organization of these criminal enterprises."[24]

1833 (1993) (recounting the various ways that state law restricted immigration prior to 1875).

[22] William Evarts, *Circular No. 10, Sent to the Diplomatic Officers of the United States* (August 9, 1879) *in* U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 11 (1880).

[23] *Id.* at 12.

[24] *Id.*

This attempt by the Executive Branch to halt Mormon immigration was not well planned. The press quickly ridiculed America for asking other countries to do its dirty work, given that Congress had not passed any ban on Mormon immigration nor had the government taken any action to stop American Mormons from going abroad to recruit new converts in the first place.[25] Several governments declined to take action, but anti-Mormon sentiment still grew in several countries, and some U.S. consular officials attempted to hinder Mormon immigration based on the State Department's directive. [26]

As the American press and public clamored to reduce Mormon immigration, federal officials responded with attempts to detain and return Mormon immigrants at U.S. ports of entry.[27] At New York City, for example, Mormons from England were detained and sent back to the United Kingdom, but the courts stepped in to protect the detained Mormons, granting them habeas relief.[28]

In 1888, responding to public claims that a recently arrived immigrant ship was packed with young woman for the imagined harems of Utah, fed-

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[25] Mulder, *supra* note 6, at 423-424.

[26] *See id.*, at 423-424 & nn. 35-40; Ardis E. Parshall, *The Very Real Consequences of the American Government's 1879 Effort to Bar Mormon Immigration*, THE KEEPAPITCHININ, (Aug. 10, 2016), http://www.keepapitchinin.org/2016/08/10/the-very-real-consequences-of-the-american-governments-1879-effort-to-bar-mormon-immigration/.

[27] Mulder, *supra* note 6, at 424, 427-428.

[28] *See id.*

eral officials moved in.[29] As it turned out, the company of Mormons was evenly divided between men and women, consisting mainly of families. One of the women detained was reported in the press as "'guilty of being 53 years of age and having with her two innocent grandchildren.'"[30] On other occasions, federal officials detained Latter-day Saint immigrants and then assisted Protestant missionaries in trying to persuade them to abandon Mormonism.[31]

In the late 1880s, Congress also moved to attack Mormon immigration directly. To facilitate immigration, the Church had created a financing mechanism called the "Perpetual Emigrating Fund" so Mormons living abroad could borrow money to pay for their passage, and then repay these funds once they were settled in the United States. In 1887, Congress disincorporated this fund and confiscated its assets. *See* Edmunds-Tucker Act, Pub. L. No. 49-397, ch. 397, § 15, 24 Stat. 635, 637 (1887). The law prohibited the Utah territorial legislature from taking any steps to "create, organize, or in any manner recognize any such corporation or association, or to pass any law for the purpose of or operating to accomplish the bringing of persons into the said Territory for any purpose whatsoever." *Id.*

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[29] *Id.* at 428.

[30] *See id.*

[31] *See* Fred E. Woods, *Norfolk and the Mormon Folk: Latter-day Saint Immigration Through Old Dominion (1887-90)*, 1 MORMON HIST. STUD. 72, 85-86 (2000).

D. The Effects of the Federal Government's Targeting of Mormons Lingered for Decades

Even after the Mormons publicly abandoned polygamy in 1890—the ostensible goal behind the federal government's hostility—the effects of the message of exclusion sent by the federal government's targeting of Mormonism and Mormon immigrants remained.

In 1898, the U.S. House of Representatives excluded one of Utah's duly elected Congressmen because he had engaged in (but had been pardoned for) polygamy.[32] Five years later, the U.S. Senate embarked on a massive investigation of the Latter-day Saints when Utah sent another Mormon, Reed Smoot, to represent the state as its U.S. Senator.[33] During the resulting investigation, the media "references were overwhelming (three to one) to Mormonism as a danger to the American political system and way of life."[34] The Senate investigative committee

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[32] The Congressman was Brigham H. Roberts, who had been pardoned for violation of federal anti-bigamy laws by President Grover Cleveland, along with other Mormon polygamists married prior to 1890.

[33] *See generally* KATHLEEN FLAKE, THE POLITICS OF AMERICAN RELIGIOUS IDENTITY: THE SEATING OF SENATOR REED SMOOT, MORMON APOSTLE (2004) (recounting the prolonged controversy over the election of Reed Smoot and the efforts to keep Mormons from full membership in the American political community).

[34] JAN SHIPPS, *From Satyr to Saint: American Perceptions of the Mormons, 1860-1960*, *in* SOJOURNER IN THE PROMISED LAND: FORTY YEARS AMONG THE MORMONS 51, 71 (2000).

ultimately produced thousands of pages devoted to the question of whether Mormons could be permitted to fully participate in the nation's political life. The committee voted to exclude Smoot, although the full Senate rejected its suggestion and seated Smoot in 1907. Even so, the message that non-Mormons were "insiders, favored members of the political community," *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring), while Mormons were "outsiders, not full members of the political community," *id.*, persisted.

A comprehensive scholarly study of Mormons in the media shows the nadir of treatment of Latter-day Saints came in the 1880s, corresponding to the peak of the federal government's anti-Mormon crusade.[35] But it took until well into the 20th century for the message sent by the government to dissipate. Decades after Mormons abandoned polygamy, media coverage of Latter-day Saints continued to be dominated by the suggestion that they were "'un-American'" and bad citizens, mere "'human units [who] move[d] instantly and unquestionably at [the] command'" of a religious "'hierarch.'"[36] Indeed, echoes of the government's policy of exclusion in the 1880s continued to reverberate in the opening years of the 21st century. In 2007, one in four Americans continued to tell pollsters that they would be less likely to vote for a candidate solely because she was

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[35] *See* SHIPPS, *supra* note 35, at 63 (charting the negative treatment of Latter-day Saints based on a comprehensive database of media coverage of Mormonism).

[36] *Id.* at 67.

Mormon.[37] Of religions in America at the time, only Islam garnered greater suspicion.[38]

The Mormon experience illustrates the harms that result from the government targeting a particular religion. The federal government's actions against Mormons occurred at a time when First Amendment jurisprudence was in its infancy, and the law blessed government actions that today would be blatantly unconstitutional. Fortunately, this attitude toward religious minorities has been replaced in our law. *See Romer*, 517 U.S. at 634 ("To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome." (citations omitted)). But this history shows the negative and long-lasting effects of government action aimed at religious minorities.

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[37] *See* Scott Keeter & Gregory Smith, *Public Opinion About Mormons*, PEW RESEARCH CENTER (Dec. 4, 2007), http://www.pewresearch.org/2007/12/04/public-opinion-about-mormons.

[38] *See Public Expresses Mixed Views of Islam, Mormonism*, PEW RESEARCH CENTER (Sept. 25, 2006), http://www.pewforum.org/2007/09/26/public-expresses-mixed-views-of-islam-mormonism/.

II. The First Amendment Requires Courts to Take a Hard Look at the Government's Justifications and Motivations for Actions That Disparately Affect a Religious Group

The Mormon historical experience underscores the need for rigorous judicial scrutiny of allegedly discriminatory government action, and for careful consideration of the purposes behind even facially neutral orders.

This Court has made clear that "'the First Amendment mandates government neutrality'" with respect to religion. *McCreary Cnty., Kentucky v. Am. Civil Liberties Union of Kentucky*, 545 U.S. 844, 861 (2005). Favoring one religion over another impermissibly "sends the ancillary message to . . . nonadherents that 'they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (citation omitted).

To determine whether the Executive Order's territory-based approach was pretextual rather than truly neutral, the Fourth Circuit assessed what it described as "ample evidence that national security is not the true reason" for the Executive Order. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 591 (4th Cir. 2017); *see id.* at 575-577, 594-597. In the Ninth Circuit action, the district court similarly focused on what it described as "significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related

predecessor." *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673, at *13 (D. Haw. Mar. 15, 2017). This evidence is thoroughly cataloged in the opinions and the parties' briefs, but includes such facts as then-candidate Trump's press release calling "'for a total and complete shutdown of Muslims entering the United States.'" *Int'l Refugee Assistance Project*, 857 F.3d at 594.[39]

As this Court has explained, "facial neutrality" cannot shield "[o]fficial action that targets religious conduct for distinctive treatment." *Church of the Lukumi Babalu Aye*, 508 U.S. at 534. To prevent "religious gerrymanders," *id.* at 534, courts must not "turn a blind eye to the context in which [a] policy" arises. *McCreary Cnty.*, 545 U.S. 844, 866 (citation and quotation marks omitted); *see also Washington v. Trump*, 847 F.3d 1151, 1167-68 (9th Cir. 2017) (citing *Church of the Lukumi Babalu Aye*, 508 U.S. at 534). This Court should thus closely examine the "readily discoverable fact[s]" leading to the govern-

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[39] The day after then-candidate Trump issued this press release, the Mormon Church took the rare step of issuing a statement in response, pointing to the words of Church founder Joseph Smith, who said, "I am bold to declare before Heaven that I am just as ready to die in defending the rights of a Presbyterian, a Baptist, or a good man of any denomination; for the same principle which would trample upon the rights of the Latter-day Saints would trample upon the rights of the Roman Catholics, or of any other denomination who may be unpopular and too weak to defend themselves." The Church of Jesus Christ of Latter-day Saints, *Church Points to Joseph Smith's Statements on Religious Freedom, Pluralism*, MORMON NEWSROOM (Dec. 8, 2015), http://www.mormonnewsroom.org/article/church-statement-religious-freedom-pluralism.

ment action, including the "historical context" and the "sequence of events." *McCreary Cnty.*, 545 U.S. at 862.

The Mormon experience illustrates why it is important for courts to carefully examine the government's proffered reasons for singling out religious minorities. In the 19th century, American government officials relied on religious identity as a proxy for determining the risk of lawlessness and danger posed by Mormon immigrants and refugees. Federal officials insisted that Mormon immigrants must be detained and returned because they would likely violate anti-bigamy laws.[40]

Yet, contrary to the claims made by government officials, American Mormon missionary efforts abroad were not aimed at beguiling young women to immigrate to Mormon harems in Utah. These fantasies bore little if any relationship to the realities of the overwhelming majority of Mormon families who wished to enter the United States to escape persecution in their home countries and to unite with their co-religionists in the Utah territory. Excluding members of a religious group on the basis of stereotypes was (and is) a poor method of identifying those planning to break the law.

It is easy to understand how such a religious test would be a tempting proxy for assessing the risks of would-be immigrants, especially when such a religious test coincides with or is in reaction to popular

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[40] *See* Evarts, *supra* note 22, at 11; Mulder, *supra* note 6, at 422-424.

passions. This is precisely why the courts have an obligation to look beyond the government's purported justifications to determine whether they are religious gerrymanders.

Accordingly, amici urge this Court to take a hard look at the entire context of government action that may have a disparate impact on religious minorities. Amici do not, however, take a position on what specific contextual evidence the courts should have considered in these cases, whether the government's national security justifications were pretextual, or whether the issue is even justiciable at this stage.

CONCLUSION

This Court has long held that the judiciary has a special role in scrutinizing government action motivated by "prejudice against discrete and insular minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). And as this Court has explained, "facial neutrality" cannot shield "[o]fficial action that targets religious conduct for distinctive treatment." *Church of the Lukumi Babalu Aye*, 508 U.S. at 534. Amici thus respectfully urge the Court to subject the Executive Order to close scrutiny for a religious animus to prevent repeating the harms of the past.

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